IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	Keith A. Lowery, et al.
Serial No.:	09/592,486
Filing Date:	June 8, 2000
Confirmation No.	4296
Group Art Unit:	2143
Examiner:	April L. Baugh
Title:	**METHOD AND APPARATUS FOR DYNAMIC DATA FLOW CONTROL USING PRIORITIZATION OF DATA REQUESTS**

MAIL STOP AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

The following Pre-Appeal Brief Request for Review ("Request") is being filed in accordance with the provisions set forth in the Official Gazette Notice of July 12, 2005 ("OG Notice"). Pursuant to the OG Notice, this Request is being filed concurrently with a Notice of Appeal. Applicants respectfully request reconsideration of the Application in light of the remarks set forth below.

REMARKS

In the prosecution of the present Application, the Examiner's rejections and assertions contain clear errors of law, including a failure to establish *prima facie* rejections in a Final Office Action. To assist the Panel in the review of this Request, Applicants submit the following brief summary of selected portions of the prosecution history of the Application.

I. Final Office Action

In a Final Office Action of June 6, 2005, all pending claims were rejected under 35 U.S.C. §103, but as described in further details below, the Final Office Action failed to set forth a *prima facie* rejection of several of the claims.

II. Errors of Record

Most notable of the legal errors present in the examination of the Application is a failure of the Final Office Action to establish a *prima facie* rejection of all the claims in the application.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations." MPEP § 2143.

First, Applicants respectfully submit that there is no suggestion or motivation, in either *Colyer* or *Moyal* or in the knowledge generally available to one of ordinary skill in the art, to combine *Colyer* and *Moyal* as proposed by the Examiner. Applicants note that the Examiner has not provided the required evidence of a suggestion to combine *Colyer and Moyal*. As mandated by the Federal Circuit, "[t]he factual inquiry whether to [modify] references must be thorough and searching." *In re Sang-Su Lee,* 277 F.3d 1338, 1343 (Fed. Cir. 2002). Any "conclusory statements . . . do not adequately address the issue of motivation to combine." *Id.* The Examiner simply states at page 3 of the Office Action that "[a]t the time the invention was made, one or ordinary skill in the art would have been motivated to dynamically update a priority queue in response to a change of a state in order to process the queue with highest priority quickly, thus maximizing the data processing efficiency." The statement ("in order to process the queue with highest priority quickly, thus maximizing the data processing efficiency") merely presents a perceived advantage of the combination, but there is no "factual inquiry" in this statement. Thus, this reasoning surely cannot be said to be "thorough and searching."

Furthermore, Applicants submit that one having ordinary skill in the art would not be motivated to combine *Colyer* and *Moyal* because *Colyer* is directed towards prioritizing messages (requests) from clients, (*See, e.g., Colyer,* FIG. 1 and col. 4, lines 17-27), and

utilizes a "pull" model for requests from a queue ("servers 'pull' the requests off of the queue"). (*Colyer*, col. 6, lines 26-44). Conversely, *Moyal* is directed towards managing the flow of data from data sources to a queue of a destination output via "an arbiter that utilizes a link list to arbitrate access between multiple data sources and a single destination queue." (*See, e.g., Moyal*, FIG. 1 and col. 4, lines 6-8). "The arbiter . . . performs two main methods in implementing the arbitration function: (1) adding a new input source queue to the linked list and (2) searching for a source queue with data ready to transmit and subsequently removing the queue from the linked list." (*Moyal*, col. 6, lines 58-62). The data in *Moyal* is being "pushed" by the arbiter to a destination queue. There are no servers in *Moyal* that "pull" data as is done is *Colyer*.

Therefore, Applicants respectfully submit that there is no suggestion or motivation, in either *Colyer* or *Moyal* or in the knowledge generally available to one of ordinary skill in the art, to combine *Colyer* and *Moyal*. For at least this reason, a *prima facie* case of obviousness has not been established.

Second, Applicants respectfully submit that neither *Colyer* nor *Moyal*, alone or in combination, discloses, teaches, or suggests each and every limitation of independent Claims 1, 25, and 30. For example, the *Colyer-Moyal* combination proposed by the Examiner fails to disclose, teach, or suggest "automatically adjusting the priority criteria," and "dynamically updating the priority of the request to send data to the client computer in response to the adjusted priority criteria," recited in Applicants' independent Claim 1.

The Examiner states at pages 2 and 3 of the Office Action that "Colyer teaches a method for data processing comprising: ... automatically adjusting the priority criteria," and cites to column 6, line 64 to column 7, line 18 of *Colyer* for support, which states as follows:

> By using a messaging and queuing unit between the Internet and a plurality of parallel-connected servers, messages stored in the messaging and queuing unit 31 can be prioritized using well-known messaging and queuing techniques. FIG. 2 shows a priority assigning unit 312, which assigns priorities to client request that are stored in queue 311, both of these elements are parts of the well-known structure of a messaging and queuing unit. For example, if one client Web browser 1a is requesting textual information (e.g., sports scores) and another client Web browser 1b is requesting graphical data (a colour picture of the sports arena), it would be useful to be able to serve the textual information first, as the graphical information takes much longer to serve as it is much more data intensive. Browser 1a would thus be quickly served the simple text request. Browser 1b would expect to wait longer for the graphics request and thus it is highly advantageous to serve the text request first. The two HTTP requests stored in the queue of unit 31 are examined by looking at the extensions of their URL's. If the extension refers to text

(HTML) this HTTP request is moved ahead of a request having an extension GIF (signifying graphical image data).

The cited paragraph of *Colyer*, however, says nothing about automatic adjustment of priority criteria. The paragraph merely states that messages can be prioritized using well-known messaging and queuing techniques, and that these messages may be prioritized based on priority criteria, such as the type of data requested. There is simply no teaching or suggesting that priority criteria is automatically adjusted. Examiner also states at page 17 of the Office Action that "the priority is based on criteria such as textual information or graphical data. The priority is given to whichever takes less time to process, therefore the criteria is automatically adjusted." The statement, however, also says nothing about automatic adjustment of priority criteria, only that priority is given to the request that takes less time to process, which in the example given is the textual information. *Moyal* also does not disclose this limitation, nor does the Examiner allege that *Moyal* does. Thus, for at least this reason, the *Colyer-Moyal* combination proposed by the examiner fails to disclose, teach, or suggest each and every limitation of independent Claim 1.

The Examiner also states at page 3 of the Office Action that "Moyal teaches dynamically updating a priority queue of a requested [sic] to send data to a client computer in response to an adjusted priority criteria," and cites to figure 2B and column 3, lines 30-40 for support. However, because neither *Colyer* nor *Moyal* discloses, teaches or suggests automatic adjustment of priority criteria, these references also do not disclose, teach or suggest dynamically updating the priority of a request in response to the adjusted priority criteria. Furthermore, as discussed above, *Moyal* is directed towards an arbiter that manages the flow of data from data sources to a queue of a destination output. *Moyal* prioritizes data sources according to whether a data source has recently sent data, but does not prioritize requests. Thus, *Moyal* fails to disclose, teach or suggest prioritizing requests to send data to a client computer, much less in response to any adjusted priority criteria. Thus, for this additional reason, the *Colyer-Moyal* combination fails to disclose, teach or suggest each and every limitation of independent Claim 1.

Therefore, for this additional reason, a *prima facie* case of obviousness has not been established with respect to independent Claim 1, as well as independent Claims 25 and 30 for analogous reasons. Reconsideration and favorable action are respectfully requested.

Dependent Claims 2-4 and 6-24 depend from independent Claim 1, dependent Claims 26-29 depend from independent Claim 25, and dependent Claims 31-44 depend from independent Claim 30. These claims are also not rendered obvious by the *Colyer-Moyal*

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combination proposed by the Examiner because they include limitations of their respective base claim as well as additional limitations that further distinguish *Colyer* and *Moyal*. Reconsideration and favorable action are respectfully requested.
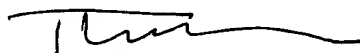
III. Request for Relief from Errors

As a *prima facie* rejection has not been established against Claims 1-4 and 6-44, Applicants respectfully request a finding of allowance of Claims 1-4 and 6-44.

CONCLUSION

If the PTO deems that an interview is appropriate, Applicants would appreciate the opportunity for such an interview.

To the extent necessary, the Commissioner is hereby authorized to charge any required fees or credit any overpayments to Deposit Account No. 02-0384 of BAKER BOTTS L.L.P.

Respectfully submitted,

BAKER BOTTS L.L.P.

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